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In the Supreme Court of the United States

OCTOBER TERM, 1964

No.

WILLIAM M. O'KEEFFE, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, PETITIONER

v.

SMITH, HINCHMAN & GRYLLS ASSOCIATES, INC., and ROYAL INDEMNITY CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of William M. O'Keeffe, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on February 27, 1964.

OPINIONS BELOW

The opinion of the court of appeals is reported at 327 F. 2d 1003 (App. A, *infra*, pp. 13-14). The opinion of the district court is reported at 222 F. Supp. 4.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, p. 14) was entered on February 27, 1964. By an order dated May 27, 1964, Mr. Justice Black extended the time for filing this petition to and including July 24, 1964. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Deputy Commissioner found that the death by drowning of an employee, who was stationed at a defense base in South Korea, arose out of and in the course of his employment, and awarded the employee's widow and child monthly death benefits under the Longshoremen's and Harbor Workers' Act, as extended by the Defense Bases Act. The district court affirmed the finding and sustained the compensation award.

The question presented is whether the court of appeals, in re-examining the Deputy Commissioner's finding, invoked the more exacting standards generally applicable to employment at a home base rather than the more liberal standards properly applicable in the case of defense-based employment.

STATUTES INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Act (Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*) and the Defense Bases Act (Act of August 16, 1941, as amend-

ed, 56 Stat. 1035, 42 U.S.C. 1651, *et seq.*) are set forth in Appendix B.

STATEMENT

This action was brought in the United States District Court for the Middle District of Florida by the employer (respondent Smith, Hinchman & Grylls Associates, Inc.) and its insurance carrier (respondent Royal Indemnity Company) to set aside and enjoin enforcement of a compensation order awarding death benefits under the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Defense Bases Act, to the widow and minor child of Robert C. Ecker, a deceased employee (R. 2-24). Ecker, at the time of his death, was employed at a defense base in South Korea by Smith, Hinchman & Grylls Associates, a government contractor subject to the provisions of the Longshoremen's Act (R. 3). The employee drowned while boating on a lake located 30 miles east of Seoul, South Korea. The Deputy Commissioner found that the accident and subsequent death arose out of and in the course of Ecker's employment (R. 7). The undisputed facts underlying the finding were stipulated before the Deputy Commissioner and may be summarized as follows.

Ecker was hired in the United States under an oral employment contract by the terms of which he was to be transported to South Korea, remain there for two years, and then be transported back to the United States (R. 14, 21, 23). He worked in Korea as assistant to the employer's administrative officer and

was responsible for stenographic and clerical department personnel (R. 13). He lived in the city of Seoul and was paid by the employer for the cost of his housing and utilities (R. 14). In addition, Ecker received a payment of 3,000 hwan ($6.00) per day from the employer "as a per diem expense to cover the necessary living expenditures in the Korean economy" (R. 22). He worked on a "365 day per year basis * * * subject to call to the job site at any time, but usually spent only eight hours a day at the job site;" however, he "quite often worked Saturdays and Sundays," and frequently was called upon to work at times other than the usual working hours (R. 14, 21). In fact, it was quite possible that Ecker had worked the Saturday morning of his accident (R. 24). In addition, as the employer emphasized, all its employees "are considered in the course of regular occupation from the time they leave the United States until their return" (R. 23).

The employer furnished no recreational facilities for its employees, but invited them to participate in recreational activities furnished by the United States Government for personnel working on government contracts (R. 22). The employer, however, "knew and expected Mr. Ecker and other employees" to seek recreational activity away from the job site on weekends and holidays (R. 23, 14).

The Deputy Commissioner found that although Ecker was not performing direct service for the employer on the day of his death, he was on call and paid full wages for that day (R. 7). He further

found that the conditions of Ecker's employment "created a zone where he had to seek recreation under exacting and unconventional conditions" (R. 7). He concluded that Ecker's death arose out of and in the course of his employment and awarded benefits to the employee's widow and child (R. 6-9).

After considering the evidence stipulated before the Deputy Commissioner, the district court ruled that "the Deputy Commissioner was correct in his finding that the conditions of the deceased's employment created a zone where the deceased Ecker had to seek recreation under exacting and unconventional conditions and that therefore the accident and death of the decedent arose out of and in the course of employment" (R. 37), affirmed the compensation award and granted the Deputy Commissioner's motion for summary judgment (R. 38).

The Court of Appeals for the Fifth Circuit, in reversing the district court and setting aside the award, held that (App. A, p. 13):

> Unless the facts of *United States and Gondeck v. Pan American World Airways*, 5th Cir. 1962, 299 F. 2d 74, are to be distinguished or the principles there set forth are to be rejected, we must reverse the judgment of the district court. The facts are not to be distinguished. Indeed, the facts here make a stronger case for the employer than in *Gondeck*. We adhere to the doctrine of the *Gondeck* case and reverse the district court.

REASONS FOR GRANTING THE WRIT

The failure of the court below to uphold the Deputy Commissioner's finding that the employee's death arose out of and in the course of his employment is in direct conflict with decisions of the Court of Appeals for the Ninth Circuit in *Self* v. *Hanson*, 305 F. 2d 699, and *Hastorf-Nettles, Inc.* v. *Pillsbury*, 203 F. 2d 641. If permitted to stand, the decision below will mean that in the Fifth Circuit there is a much more exacting standard of what constitutes an injury or death arising out of and in the course of employment at an overseas defense base than applies in the Ninth Circuit.

1. The Longshoremen's Act, as extended by the Defense Bases Act, provides workmen's compensation coverage for an "accidental injury or death arising out of and in the course of employment" at a defense base. 33 U.S.C. 902(2), 42 U.S.C. 1651-1654, *infra*, pp. 15-17. The initial determination of whether an injury or death is covered by the Act must be made by a Deputy Commissioner. 33 U.S.C. 919. His determination is, of course, subject to judicial review, but may be set aside only if unsupported by substantial evidence in the record considered as a whole, or if inconsistent with the law. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504; *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469.

The Deputy Commissioner here found "that the conditions of the employment created a zone where the employee had to seek recreation under exacting and

unconventional conditions; [and] that the accident and the subsequent death of the decedent arose out of and in the course of employment" (R. 7). The district court affirmed this finding, but the court below reversed, stating that the doctrine enunciated by it in *United States* v. *Pan American World Airways*, 299 F. 2d 74 (D. N.Y.), certiorari denied, 368 U.S. 980, was controlling. In *Pan American*, the court below had reversed the Deputy Commissioner's award of compensation to the widow of an employee who had been stationed at a defense base on the island of San Salvador. The employee had died as the result of injuries sustained in a "jeep" accident which occurred after he had completed his work for the day and while he was returning from a recreational trip. The court, quoting "black-letter law" from 1 Larson, *Workmen's Compensation Law*, 328-329 (299 F. 2d at 77), stated that:

> Recreational or social activities are within the course of employment when
>
> (a) They occur on the premises during lunch or recreation period as a regular incident of the employment; or
>
> (b) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> (c) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee

> health and morale that is common to all kinds of recreation and social life.

These standards, it appears, were also applied by the court below in the instant case. We would have no quarrel with these precepts had this been the usual case of home-based employment. However, as the Ninth Circuit recognized in *Self* v. *Hanson*, *supra*, cases involving employment at overseas defense bases present discrete problems. In affirming the Deputy Commissioner's award of compensation to a Guam defense-base employee who was injured after her work-day had terminated when a truck collided with the parked automobile in which she was sitting, the Ninth Circuit stated "we do not think the case is to be tested by the conventional mainland case * * *." 305 F. 2d at 703. Similarly, in *Hastorf-Nettles, Inc.* v. *Pillsbury*, *supra*, an Alaska defense-base employee was injured in a truck accident while returning from Labor Day recreation some forty miles from his job site. The Ninth Circuit held that factors such as the unique character and isolated place of employment, its remoteness from available recreation, its narrowed limits of normal pastime, and the benefit to both employer and employee of recreation as an economic factor in industrial relations "adequately in law justified the Deputy Commissioner in finding as he did on the whole record before him that Vogel's injuries arose out of and in the course of his employment." 203 F. 2d at 643.

We submit that the Ninth Circuit has properly recognized that the "course of employment" concept must be interpreted more liberally with respect to

injuries occurring at a remote defense base than it is in the "conventional mainland" situation. Its view, we note, is consistent with the decision of this Court in *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, which upheld the Deputy Commissioner's "course of employment" finding where an employee stationed at a remote defense base on the island of Guam died by drowning.

The Ninth Circuit's approach is also supported by numerous State court decisions in workmen's compensation cases, which have held that the "course of employment" concept covers a far greater area where an employee has been sent from his home to a distant place on the business of his employer. These cases have developed the "special mission" rule:

> [W]hen an employee is required to travel to a distant place on the business of his employer and is directed to remain at that place for a specified length of time, his status as an employee continues during the entire trip, and any injury occurring during such period is compensable, so long as the employee at the time of injury was engaged in a reasonable activity.

Schneider v. *United Whelan Drug Stores*, 284 App. Div. 1072, 1072-1073, 135 N.Y.S. 2d 875, 876 (1954).[1] See also *Gardner* v. *Industrial Comm'n*, 72 Ariz. 274, 233 P. 2d 833 (1951); *Fidelity & Casualty*

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[1] In that case, an employee was sent on business from his regular employment in New York to Miami, Florida. After completing a day's work in Miami, he was injured when the boat in which he was riding as a guest of a local employee capsized. The court held the injury to be compensable.

Co. of New York v. *Industrial Accident Comm'n*, 176 Cal. App. 2d 541, 1 Cal. Reptr. 567 (1959); *Alexander Film Co.* v. *Industrial Comm'n*, 136 Colo. 486, 319 P. 2d 1074 (1957); *Thornton* v. *Hartford Accident & Indemnity Co.*, 198 Ga. 786, 32 S.E. 2d 816 (1945); *Williams* v. *School City of Winchester*, 104 Ind. App. 83, 10 N.E. 2d 314 (1937); *Souza's Case*, 316 Mass. 332, 55 N.E. 2d 611 (1944); *Miller* v. *Bartlett Tree Expert Co.*, 3 N.Y. 2d 654, 148 N.E. 2d 296 (1958); *Fleer* v. *Glens Falls Insur. Co.*, 16 A.D. 2d 186, 226 N.Y.S. 2d 918 (1962); *Schreiber* v. *Revlon Products Corp.*, 5 A.D. 2d 207, 171 N.Y.S. 2d 122 (1958); *Bower* v. *Industrial Comm'n*, 61 Ohio. App. 469, 22 N.E. 2d 840 (1939); Cf. *Central Copper Co.* v. *Klefisch*, 34 Ariz. 230, 270 Pac. 629 (1928); *Reinert* v. *Industrial Accident Comm'n*, 46 Cal. 2d 349, 294 P. 2d 713 (1956); *Boynton* v. *McKales*, 139 Cal. App. 2d 777, 294 P. 2d 733 (1956); *Shell Oil Co.* v. *Industrial Accident Comm'n*, 18 Cal. Reptr. 540 (1962); *Bowen* v. *Keen*, 154 Fla. 161, 17 So. 2d 706 (1944); *Jefferson County Stone Co.* v. *Bettler*, 304 Ky. 87, 199 S.W. 2d 986 (1947); *Standard Oil Co.* v. *Witt*, 283 Ky. 327, 141 S.W. 2d 271 (1940); *Clapham* v. *David*, 232 App. Div. 458, 251 N.Y. Supp. 245 (1931); *Lamm* v. *Silver Falls Timber Co.*, 133 Ore. 468, 286 Pac. 527 (1930); *Southern Surety Co.* v. *Shook*, 44 S.W. 2d 425 (Tex. 1931); *Southern Motor Lines Co.* v. *Alvis*, 200 Va. 168, 104 S.E. 2d 735 (1958).

2. Under the more liberal approach reflected in the above cases, it seems clear that the Deputy Commissioner's conclusion rested upon adequate findings.

Ecker was hired in the United States and transported by the employer to South Korea to work there, away from his wife and child, for at least a two-year period, at the end of which he was to be transported back to the United States. He was paid on a 365-day-per-year work schedule basis, subject to call at any time of the day or night, frequently worked on Saturdays and Sundays, and was in fact considered by his employer as in the "course of regular occupation" from the moment he left the United States until his return home. The employer furnished no recreational facilities, but, in recognition of the fact that its employees did need recreation, knew and approved of their practice of seeking recreation of the type in which Ecker was engaged at the time of his death.

3. It is important that the existing conflict of decisions be resolved. The significance of the issue is underscored by the far-flung nature of our defense base activities throughout the world and by the further fact that there are several thousands of injury cases reported annually under the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Defense Bases Act.[2]

---

[2] Annual Report of the United States Department of Labor (1961), pp. 56-57.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

MORTON HOLLANDER,
MARTIN JACOBS,
Attorneys.

JULY 1964.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20605

SMITH, HINCHMAN & GRYLLS ASSOCIATES, INCORPORATED, and ROYAL INDEMNITY COMPANY, APPELLANTS

versus

WILLIAM M. O'KEEFFE, Deputy Commissioner, U.S. Bureau of Employees' Compensation for the Sixth Compensation District, APPELLEE

Appeal from the United States District Court for the Middle District of Florida.

(February 27, 1964.)

Before TUTTLE, Chief Judge, and JONES and BELL, Circuit Judges.

PER CURIAM: The facts which are present in this case are set forth in the findings of fact and conclusions of law of the district court. *Smith, Hinchman & Grylls Associates, Inc. v. O'Keeffe*, D.C.M.D.Fla. 1963, 222 F. Supp. 4. Unless the facts of *United States and Gondeck v. Pan American World Airways*, 5th Cir. 1962, 299 F. 2d 74, are to be distinguished or the principles there set forth are to be rejected, we must reverse the judgment of the district court. The facts are not to be distinguished. Indeed, the facts

here make a stronger case for the employer than in *Gondeck*. We adhere to the doctrine of the *Gondeck* case and reverse the district court. The cause is remanded for the entry of a judgment for the appellants.

REVERSED AND REMANDED.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for the entry of a judgment for the appellants.

February 27, 1964

Issued as Mandate: March 24, 1964

APPENDIX B

1. The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*) provides in part:

SEC. 2. DEFINITIONS.—When used in this Act—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

SEC. 3. COVERAGE.—(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

* * * * *

SEC. 19. PROCEDURE IN RESPECT OF CLAIMS.—(a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the

deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

* * * * *

SEC. 20. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

SEC. 21. REVIEW OF COMPENSATION ORDERS—

* * * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District). * * *

2. The Defense Bases Act (Act of August 16, 1941, as amended, 56 Stat. 1035, 42 U.S.C. 1651 *et seq.*) provides in part:

* * * * *

That (a) except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall apply in respect to the injury or death of any employee engaged in any employment—

(1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or

(2) upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States (including the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone); or

(3) upon any public work in any Territory or possession outside the continental United States (including the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone), if such employee is engaged in employment at such place under the contract of a contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) with the United States; but nothing in this paragraph shall be construed to apply to any employee of such a contractor or subcontractor who is engaged exclusively in furnishing materials or supplies under his contract;

* * * * *

irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such employee during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 307

WILLIAM M. O'KEEFFE, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

SMITH, HINCHMAN & GRYLLS ASSOCIATES, INC., AND ROYAL INDEMNITY CO.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

This supplement to the petition for a writ of certiorari is filed in order to invite the Court's attention to a recent decision of the Court of Appeals for the Fourth Circuit in *Pan American World Airways, Inc.* v. *O'Hearne*, July 13, 1964, set forth in the Appendix *infra*. That decision, we submit, is in clear conflict with the decision below.

The Fourth Circuit's opinion adopts and applies the more liberal standard previously followed in the Ninth Circuit, but rejected in the Fifth Circuit, with respect to what constitutes an injury or death aris-

ing out of and in the course of employment at an overseas defense base.

The claim for death benefits in the Fourth Circuit case arose out of the very same "jeep" accident as the claim for death benefits in the Fifth Circuit case of *United States* v. *Pan American World Airways*, 299 F. 2d 74, certiorari denied, 370 U.S. 918, discussed in our petition (pp. 7-8). The Fourth Circuit, fully aware of this, stated (App. *infra*, p. 7):

> The death of Smith's companion, Gondeck, was the subject of United States v. Pan American World Airways, Inc., 299 F. 2d 74 (5 Cir. 1962), refusing an award. If the evidence there adduced was of the same factual content as that offered here, we would deferentially disagree with the outcome.

Examination of the evidence in both cases, as summarized in each of the court's opinions, shows that there is no significant difference between them.

It should be noted that in the instant case the Fifth Circuit reversed the award of compensation benefits on the express ground that it was "adher[ing] to the doctrine of the *Gondeck* [*Pan American*] case." Thus, the Fourth Circuit's open disagreement with the *Gondeck-Pan American* decision pointedly demonstrates that the Fourth Circuit's holding is also in direct conflict with the decision below.

CONCLUSION

For the reasons stated in our petition and in this supplement, it is respectfully submitted that the writ should be granted.

ARCHIBALD COX,
Solicitor General.

AUGUST 1964.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9340

Pan American World Airways Incorporated, and The Travelers Insurance Company,
Appellees,

versus

Stephen O'Hearne, Deputy Commissioner, Fifth Compensation District, U. S. Department of Labor, Bureau of Employees' Compensation,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK
WALTER E. HOFFMAN, DISTRICT JUDGE

(Argued June 12, 1964 Decided July 13, 1964)

Before BRYAN and BELL, Circuit Judges, and CRAVEN, District Judge.

* * * *

PER CURIAM:

An award under the Defense Bases Act, 42 U.S.C. 1651-1654, was made by the Deputy Commissioner to the widow and orphans of Robert M. Smith, an employee of Pan American World Airways, Inc., for his death on San Salvador (Watling) Island in the Bahamas, a British West Indies possession where Columbus first raised land. The fatality resulted when a jeep overturned in which the decedent was riding as a passenger with other employees for recreation. He had been hired by PAA as a powerhouse operator in its performance of a Government contract for the maintenance of Atlantic range facilities in connection with the United States Air Force Missile Test Center at Cape Kennedy, Florida.

Robert Smith's home and family were in Galax, Virginia, about 1000 miles distant. Pursuant to his engagement he was provided sleeping quarters and meals at the power station. Work occupied 8 hours each day but for any emergency he was subject to call during off-time. Tracking equipment was situated throughout San Salvador.

Aside from its remoteness, the island embraced only about 42 square miles—5 miles by 13 miles in its greatest dimensions. The population consisted of approximately 800 natives. British official personnel added another 50 individuals. The only settlement, Cockburn Town, was about three miles from Smith's dormitory.

Where Robert Smith was quartered PAA furnished the employees a pool room, an outdoor picture theatre, row boats, baseball and softball equipment. Of course, the Ocean and beach provided swimming, fishing and boating opportunities. Additionally, the Reef Club was maintained there at which alcoholic beverages could be purchased, and reading and card play-

ing enjoyed. The employer supplied no transportation for the workers to leave the site. Taxis were available, and on occasion upon request use of a jeep would be allowed by PAA for recreational trips.

On April 24, 1958, when Robert Smith had completed his regular assignment for the day, he went to the Reef Club, soon after 4 o'clock P.M. Except for time at dinner or supper, he remained there with three other co-employees drinking beer or champagne.

Around 7:30 P.M. they drove in one of the PAA's jeeps—whether with the tolerance of the employer is not clear—to a native pub in Cockburn Town, known as "Evelyn's" or the "Blue Marlin Club." Here they obtained another beer, returning to the jeep in about fifteen minutes. As they approached the base, the vehicle overturned from excessive speed or due to a defect in the road. Smith and another employee, Gondeck, were killed. Neither of them was the driver, intoxication was not ascribed as a factor in their deaths. The entire excursion occupied no more than a half hour.

The Commissioner concluded that the death of Robert M. Smith arose out of and in the course of his employment. Considering the distant place of employment, the sparsity of population and limited area of the island, the Commissioner determined that the group, including the present decedent, were justified in looking for recreation beyond the confines of their habitat. In the circumstances of his employment-residence, the Commissioner thought, Smith was only "doing what he [might] reasonably be expected to do." In short, that his brief exit was "an incident of the service".

PAA and its insurance carrier, The Travelers Insurance Company, successfully petitioned the District Court to vacate the conclusion and award as not vin-

dicated by the proof. The Commissioner appeals. Although some of the factual ascertainments made by the Commissioner may be without full support, we think substantial evidence undergirds his crucial and determinative fact findings. To these he applied correct and apt principles of law. Together they dictate the award.

Like the Commissioner, we see decision here designed and patterned in O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504 (1951). Sustaining, too, is Self v. Hanson, 305 F.2d 699 (9 Cir. 1962). The death of Smith's companion, Gondeck, was the subject of United States v. Pan American World Airways, Inc., 299 F.2d 74 (5 Cir. 1962), refusing an award. If the evidence there adduced was of the same factual content as that offered here, we would deferentially disagree with the outcome.

Upon the findings, conclusions and reasons stated by the Commissioner, we believe his award should be reinstated.

Reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 307

WILLIAM M. O'KEEFFE, Deputy Commissioner,
Bureau of Employees' Compensation,
United States Department of Labor,

Petitioner,

v.

SMITH, HINCHMAN & GRYLLS ASSOCIATES, INC.,
and ROYAL INDEMNITY CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

GEORGE W. ERICKSEN
WM. C. BLAKE, JR.

Of Counsel:
MACFARLANE, FERGUSON, ALLISON & KELLY
P. O. Box 1531
Tampa 1, Florida

Attorneys for Respondents.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 327 F.2d 1003. The opinion of the district court is reported at 222 F.Supp. 4.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that injury and death of an employee, while engaged in recreation, did not arise out of and in the course of his employment under the provisions of the Longshoremen's and Harbor Workers' Act (33 U.S.C. 901, et seq.), as made applicable in this instance by the Defense Bases Act (42 U.S.C. 1651, et seq.).

STATEMENT

The deputy commissioner found that "the conditions of the employment created a zone where he [Ecker] had to seek recreation under exacting and unconventional conditions." (R. 28.) The district court affirmed the finding and concluded that "therefore the accident and death of the decedent arose out of and in the course of employment." (R. 37.) The district court also concluded "the obligations and conditions of employment created the zone of danger out of which Ecker's injury arose."

The facts adduced before the deputy commissioner were limited to a stipulation of facts.

The employer was engaged in the performance of an engineering-management type of contract with the United States Government and with the Republic of Korea at the city of Seoul. (R. 20.) Ecker was engaged in the capacity of clerk-stenographer and assistant to the administrative officer in Korea. He performed all of the duties of his job within the city of Seoul. The employee did not live on a defense base or at the site where he worked, but received an allowance to live on the Korean economy. He had contracted to work for the employer for two years at that place.

The employer furnished no recreational facilities for its employees, but they were invited to participate in recreational activities furnished by the United States Government at Seoul. (R. 22.)

The employee lost his life from drowning when a boat, in which he was riding capsized on a lake located approximately thirty miles from Seoul. Transportation

to reach the lake was not furnished by the employer, nor was the boat. The particular activities of the employee at the time he met his death were in no way specifically authorized by the employer and took place without its knowledge. (R. 13.)

Employees utilized Government recreation facilities, and also frequently travelled on weekends and holidays for recreation. The accident occurred on the employee's Memorial Day weekend (R. 13.)

At the time of the accident, the employee and two companions were using a small aluminum boat, propelled by an outboard motor, to haul a load of sand across the lake to be used to build up the beach in front of the lakeside lodge occupied by the employee's companions, who were not fellow-employees of Ecker. The boat capsized and Ecker and one of his companions were unable to reach shore and were drowned. (R. 12.) The particular activity in which Ecker was engaged at the time of the accident was in no way authorized by the employer and was being done without its knowledge.

The court of appeals reversed the district court, holding that the accident and death of Ecker did not arise out of and in the course of employment.

ARGUMENT

The decision of the court of appeals in this case is based upon well-established principles of workmen's compensation law. There are no conflicting decisions, despite the contentions to the contrary in this regard, and the court of appeals was clearly correct in applying well-established principles of workmen's compensation law in denying compensability of an injury occurring while the employee was participating in recreational activities.

1. The statement of petitioner's contention here regarding the question presented, suggests that compensability of accidents under the Longshoremen's and Harbor Workers' Compensation Act is governed by more liberal standards when applied to defense-based employment. Petitioner concedes the correctness of the precepts recited by the court of appeals for the Fifth Circuit in *United States v. Pan American World Airways,* 5 Cir., 1962, 299 F.2d 74, that recreational activities are not considered within the course of employment except in limited circumstances of which company-sponsored recreation is the easiest illustration. Yet, it is urged that this settled rule of workmen's compensation law should not be applied in the instant case, simply because the employee was living and working in a foreign country. It is urged that there is authority for this interpretation of the Longshoremen's and Harbor Workers' Act, to be found in cases decided in other circuits. We submit that the decision in this case is not in direct conflict with any decisions of other circuits, or in conflict with any decision of this Court.

2. It is urged that the decision in this case is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *Self v. Hanson,* 9 Cir., 1962, 305 F.2d 699, and *Hastorf-Nettles, Inc. v. Pillsbury,* 9 Cir., 1953, 203 F.2d 641.

Self v. Hanson, supra, does not stand for any proposition that might be interpreted as an extension of liberalization of any principle of workmen's compensation law as applied to recreation activities of defense-based employees. The outstanding feature of the case is that the court considered it "as one of limited application in a situation where a recreational void had to be filled by the company." (305 F.2d 699, 703.) There, the employer "had to provide inducement for its recruits by providing for their recreation." "This they chose to do by sponsoring organized trips and projects and supplying cars for unsupervised recreation." (305 F.2d 699, 702.) The employee was injured in an automobile accident while occupying an automobile driven by her "boss", who was authorized in writing to use the car for recreation. As the court observed, the accident occurred on "one of the very few points on the island's roads [Guam] where MK-PK employees were authorized to go for recreation." (305 F.2d 699, 702.) While the court of appeals gave no specific recognition of the rule of law rendering compensable those injuries which occur as an incident to company-sponsored recreation, as recognized by the Court of Appeals for the Fifth Circuit in *United States v. Pan American Airways,* supra, the court's holding in *Self* is wholly consistent with earlier precedent, and is certainly not in conflict with the decision in the Fifth Circuit, decided upon facts wholly different from those in *Self.*

3. It is contended that another case decided in the Ninth Circuit, *Hastorf-Nettles, Inc. v. Pillsbury*, supra, is in conflict with the present case. We cannot agree. Again, the injury occurred in an automobile accident. The accident occurred within the confines of the military reservation, in Alaska, where the employee lived and worked, while he was riding in a vehicle which had been checked out for a recreational trip by its driver. The truck was owned by the "prime contractor" who provided all needed transportation for employees of its subcontractor, claimant's employer, and "it was customary for the prime contractor's drivers to pick up and give a ride to any workmen on the base, irrespective of whether the workmen were going on business or otherwise." (203 F.2d 641, 642.)

The court in *Hastorf-Nettles, Inc.*, supra, did observe that the occasion for the transportation was the employee's returning from a recreational trip in a distant town, and that there were no recreational facilities maintained in the military reservation where the employee lived. It predicated its decision, at least in part, upon the "isolated place of the employment" and "its remoteness from available recreation and its narrowed limits of normal pastime," implying that the risk of transportation to and from recreation under these circumstances was an incident of employment. That case, on the facts controlling it, is not in conflict with the instant case, even if the case had been decided wholly upon this rationale. However, the Court of Appeals for the Ninth Circuit relied heavily upon the principle that the injury is compensable when it occurs as an incident of transportation furnished by the employer, citing *Voehl v. Indemnity Insurance Company of North America*, 288

U.S. 162, 169, 53 S.Ct. 380, 77 L.Ed. 676, *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 480, 67 S.Ct. 801, 9 L.Ed. 1028, and *Liberty Mutual Insurance Co. v. Gray*, 9 Cir., 1943, 137 F.2d 926.

In the latter case, which was also governed by the provisions of the Longshoremen's and Harbor Workers' Compensation Act, the employee was being returned from a recreational trip to his place of work in a transportation facility hired by his employer for that purpose. In that case, the court remarked that it was conceded that the employee, on his way to work, was covered under the Act if the motor vehicle in which he was injured was furnished by the employer. (137 F.2d 926, 928.)

There is no language in the opinion of *Hastorf-Nettles, Inc.*, supra, from which it can be demonstrated that the court intended that its holding should stand for the proposition urged here—that a defense-based employee is automatically covered under the Act while engaged in recreation. An implied holding that risks of transportation are an incident of employment where extensive travel is required by that employment in order to reach reasonable recreation, which is not available at the remote outpost where employment requires the employee to live and work, does not support the contention that the case is in direct conflict with the holding here.

4. Petitioner infers that this court's holding in *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, stands for a proposition which is inconsistent with the decision in this case. In that case, the principal point at issue was whether an employee's response to humanitarian instincts by entering dangerous waters which he

had been forbidden to enter to attempt a rescue, could be said to amount to a departure from employment. The employee had been waiting for his employer's transportation upon premises maintained by the employer for recreational purposes, which it sponsored. That case is inapposite on the point involved here.

5. It is next urged that a case recently decided in the Court of Appeals for the Fourth Circuit, *Pan American World Airways, Inc., v. O'Hearne,* set out in full in petitioner's Supplement, is in "clear conflict" with the decision in the instant case. It appears that that case arose out of the same "jeep" accident as was the subject of consideration by the Fifth Circuit case of *United States v. Pan American World Airways,* supra, the claim in the former case having originated from a different Compensation district, and heard by a different deputy commissioner. The Court of Appeals for the Fourth Circuit held that injury to another occupant of the same motor vehicle was compensable. While this decision may, upon cursory examination, tempt one to find a direct conflict with the decision in the Fifth Circuit, that decision is certainly not in direct conflict with the instant case. The facts are not even remotely similar to those in the instant case, and a difference in facts found by different deputy commissioners can easily account for the different conclusions reached in the two circuits.

When Gondeck's case was before the Fifth Circuit, that court noted that the use of the "jeep" for recreational purposes was forbidden by the employer and that the employer did furnish free bus service between the camp and the town. It also noted that the accident occurred at a place which was not on the premises of the employer, and occurred when the claimant was not using a means of travel to and from a place of recreation

furnished by the employer. It appears from the opinion of the District Court in the *O'Hearne* case, supra, that upon a remand for further findings by the deputy commissioner, it was found that the employee, on a temporary duty assignment on San Salvador Island, "could not escape the work environment," because the Island was so tiny; it was noted that "the entire Island was practically the work site." (221 Supp. 515, 517). It appears also in that opinion that no transportation between town and camp was provided, contrary to the finding in the case as decided in the Fifth Circuit. Directly contrary to the finding of the Court of Appeals for the Fifth Circuit, was the deputy's finding in the *O'Hearne* case, supra, that use of the employer's "jeeps" for recreation was authorized, and there was no prohibition against riding in company "jeeps". It also appears, from the opinion of the district court in that case, that the accident occurred close to the main gate of the camp on a road maintained by the employer, and the Court of Appeals for the Fourth Circuit observed that the accident occurred either as a result of excessive speed or some defect in the road.

We submit that the most significant difference in the facts as they were considered in the two circuits, is the deputy's finding in the *O'Hearne* case, supra, that the Island was so tiny that the work site comprised the entire Island, that the size of the Island did not permit an employee to ever disassociate himself from the work environment. Those additional facts suggest the applicability of "bunk house" rule, under which it has traditionally been held that employees whose duties require them to remain constantly upon the premises of their employer, are continuously in the course of employment

with respect to all activities—even of a personal nature—which are engaged in while remaining on the employer's premises. See *Southern Surety Co. v. Shook*, Tex. 1931, 44 S.W.2d 425; *Lamm v. Silver Falls Timber Co.*, 133 Ore. 468, 286 P. 527.

It should also be noted that the opinion of the Court of Appeals for the Fourth Circuit, in the *O'Hearne* case, supra, observes that there is a conflict between the two circuits "if the evidence there adduced was of the same factual content as that offered here," As we have pointed out, it appears from the reading of the opinion of the district court in the *O'Hearne* case, supra, and a comparison with the case decided by the Fifth Circuit, that there was a difference in the factual content of the record. But in any event, the decision and rationale of the court in the *O'Hearne* case, supra, does not support the contention urged, that it stands for the proposition that injuries occurring to employees during participation in athletics or recreation are compensable under the Longshoremen's and Harbor Workers' Act, whether sponsored and maintained by the employer or not.

6. Petitioner suggests, by citation to many authorities from State courts, that there is some body of law or principle that changes the rules of compensability as they are applied to injuries occurring during participation in recreation. None of these cases has any application to the question involved in this case. Almost without exception, the cases involve rules applied in the so-called "travelling salesman" cases, cases involving injuries occurring during travel to and from lodging and meals while the employee is bound for or on a bus-

iness trip, or some special errand for his employer. One of the cases cited, *Alexander Film Co. v. Industrial Commission,* 136 Colo. 486, 319 P.2d 1074, clearly recognizes a distinction applicable to the "travelling salesman" cases between pure recreation, which results in a "stepping aside," and other attentions to personal needs which are generally held compensable in that class of case.

7. The decision in this case was correctly decided by the Court of Appeals for the Fifth Circuit. The deputy commissioner had found that the employment created a zone where the employee "had to seek recreation under exacting and unconventional conditions" and that therefore the accident and death arose out of and in the course of employment. This finding was confirmed by the district court which buttressed the finding somewhat to conclude that "the obligations and conditions of employment created the zone of danger out of which Ecker's injury arose." There was no evidence contained in the stipulation upon which the deputy commissioner entered his order, that could be said to give rise to these inferences. There is nothing in the record regarding any hazards or dangers at all, or concerning any zone of danger, to which the employee was ever subjected as a necessary incident of reasonable recreation—or travel required to reach it. At the time of his death, the employee's activities were wholly disassociated from his employment evironment. If the case had been decided in accordance with petitioner's contentions, the result would have been to completely emasculate the provision of the statute that the injury, in order to be compensable, must arise out of and in the course of employment. The alleged conflicts among decisions of the several circuits does not exist when the cases are analyzed. While

the *O'Hearne* case, supra, may seem to go far toward providing support for the contention that there is a conflict between it and the companion case decided by the Court of Appeals for the Fifth Circuit, the apparent conflict is elusory. Even if the conflict is said to exist, there is no conflict between the *O'Hearne* case, supra, and the instant case. There is nothing contained in the opinion of the Court of Appeals for the Fourth Circuit to suggest that it would have decided the instant case differently from the Court of Appeals for the Fifth Circuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

GEORGE W. ERICKSEN
WM. C. BLAKE, JR.

Of Counsel:

MACFARLANE, FERGUSON, ALLISON & KELLY
P. O. Box 1531
Tampa 1, Florida

Attorneys for Respondents.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 307

WILLIAM M. O'KEEFFE, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

SMITH, HINCHMAN & GRYLLIS ASSOCIATES, INC., AND ROYAL INDEMNITY CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 474

PAN AMERICAN WORLD AIRWAYS, INC., AND THE TRAVELERS INSURANCE CO., PETITIONERS

v.

STEPHEN O'HEARNE, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, FIFTH COMPENSATION DISTRICT, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM OF THE SOLICITOR GENERAL

On October 21, 1964, we advised the Court, by letter, as follows:

In No. 307, the government has filed a petition alleging a conflict between the decision of

the Fifth Circuit in that case and decisions of the Fourth and Ninth Circuits. In No. 474, petitioner Pan American seeks review of a Fourth Circuit decision relying upon the same conflict to which the government refers in No. 307. The government has expressed its acquiescence to a grant of the writ in No. 474.

We have just received a copy of an opinion of the Fifth Circuit in a third case, *O'Keeffe* v. *Pan American World Airways*, C.A. 5, No. 20440, October 16, 1964 (copy attached). It appears from a preliminary examination that this latest opinion represents a modification of the Fifth Circuit's earlier views with respect to the issues involved. The opinion, however, is that of a panel of the court and we are not yet advised whether the losing party (Pan American) will seek a rehearing *en banc*.

This letter is written to inform the Court of the recent development noted above—one which might affect its disposition of the two pending petitions—and to suggest that it would be appropriate to withhold action upon the petitions for a period of two weeks in order to afford all parties concerned an opportunity to submit their views by supplementary memoranda.

We are now informed that counsel for Pan American will file a petition for rehearing *en banc* in case No. 20240. If this petition should be granted, the Fifth Circuit will be in a position to express itself definitively upon the issue which has led to a claim of conflict in the two cases pending before this Court. We accordingly suggest that it would be appropriate for this Court to hold the petitions in Nos. 307 and

474 pending the court of appeals' disposition of the petition for rehearing *en banc* to be filed in No. 20440.

For the convenience of the Court, we are reprinting as an appendix hereto the opinion of the panel in No. 20440.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

NOVEMBER 1964.

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

No. 20440

WILLIAM M. O'KEEFFE, DEPUTY COMMISSIONER, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

versus

PAN AMERICAN WORLD AIRWAYS, INC., ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

(October 16, 1964)

Before TUTTLE, Chief Judge, and WISDOM, Circuit Judge, and MCRAE, District Judge.

WISDOM, Circuit Judge: This is a "scope-of-employment" case involving an employee on Grand Turk Island in the British West Indies, 700 miles from the mainland. Discussing a similar case, Judge Chambers of the Ninth Circuit has written: "We do not think that the case is to be tested by the conventional mainland case where the truck driver departs from his authorized route for his private personal conven-

ience." *Self* v. *Hanson*, 9 Cir. 1962, 305 F. 2d 699. We agree with the Ninth Circuit.

The appeal is from a judgment setting aside a compensation order issued by the Deputy Commissioner, Secretary of Labor, under the Defense Bases Act, 42 U.S.C.A. §§ 1651–1654. The order awarded death benefits to the widow and minor children of George B. Rose, an employee of Pan American World Airways, who was killed in a traffic accident on Grand Turk. On the essential question whether the employee's death arose out of the course of his employment, the district court considered *Gondeck* (*United States* v. *Pan American World Airways, Inc.*, 5 Cir. 1962, 299 F. 2d 74, cert. denied, 370 U.S. 918) controlling. We find *Gondeck* distinguishable. On the record before us, substantial evidence and fair inferences support the Deputy Commissioner's findings and require reinstatement of his order.

Pan American World Airways, Inc. is one of the government cost-plus contractors in the Cape Canaveral missile project. Its Guided Missile Range Division has a series of tracking stations on islands strung out into the South Atlantic. One such station is located on Grand Turk, a small, flat, tropical Island in the Caicos Islands Group. Its white population varies from about 30 to 125. There are anywhere from 1,400 to 3,000 natives on the island. In addition to the PAA tracking station on a United States Air Force land strip, there is a tiny United States Navy base, and a small office of British Wireless & Cable, Ltd. Cockburn Town, the island's only settlement, has two streets and the Queen's Highway which runs to the PAA base two miles from the village.

There are few recreational facilities on Grand Turk.[1] At the tracking station, PAA runs the "Conch Club", a cocktail lounge and game room. Boating, fishing, and swimming are available during the daytime. For other recreation PAA employees must go to the "Exiles Club" of British Wireless & Cable, Ltd., or to one of the four or five "juke joints" or bars located in native shacks, or to the parish hall of the Anglican Church.

George B. Rose was the "Medical Recreation Supervisor" on the island. His duties required him to organize social and recreational activities for the men on the base and to render assistance to the base medical officer. His nominal duty hours were from 7:15 A.M. to 4:15 P.M. during the week and from 7:15 A.M. to 12:00 Noon on Saturdays, but he was on call at all times. When he left the base he was required to leave word where he could be located and he was often called upon for emergency duties. He

[1] The Commissioner's supplemental "Clarifying Findings" state: "[At the time of his death Rose was] . . . on a journey of recreation for respite from the natural boredom inherent in the unique character and isolated site of employment, its remoteness from available recreation, and its narrow limits of normal pastime, and that such recreation was a benefit to the employer as an economic factor in industrial relations." The appellee, in its brief, would allow no room for any inference that employees lack or need recreation on Grand Turk: "There is no evidence that there was any 'natural boredom inherent in the unique character and isolated site of employment'; no evidence that Rose needed or was seeking 'respite' from it. The proposed finding that the island was characterized by 'remoteness from available recreation' is contradicted by the fact that Pan American had provided a club for the recreation of its employees; and there is no evidence that the supposed recreation Rose was seeking in the company of Mrs. Smith or in one of the native night clubs in Cockburntown 'was a benefit to the employer as an economic factor in industrial relations'."

received a salary of $440 a month plus a "down range" bonus of 30 per cent.

September 11, 1959, after his regular duty hours, Rose borrowed a friend's motor scooter and made a social visit to the home of the Leroy Smiths near Cockburn Town. On his way back he had gone 200 yards down the highway when his scooter collided with a PAA truck. Rose was killed.

The record shows that as the truck and the scooter approached, the driver of the truck moved his vehicle to the *left* side of the road. Grand Turk is a British possession where the law of the road requires vehicles to drive on the left side of the road. Rose had been on the island for about three months. On a number of occasions he had driven a jeep, but the evidence suggests that this night was the first time he had been in control of a vehicle on the highway after dark. The Commissioner drew the inference that Rose's long ingrained habit of right hand driving asserted itself when confronted with an emergency traffic situation. By veering to the right instead of to the left, he put his scooter onto a collision course. Rose had played cribbage for three hours before leaving the Smiths' home, and every witness testified to his sobriety. The Deputy Commissioner found that at the time of the accident Rose was sober, that he was not in violation of any order or work rule of PAA, and that the proximate cause of the accident was Rose's confusion over the controlling rules of the road.

The Defense Bases Act requires payment of the compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901–950 for injury or death of employees sent away from home on overseas missions "irrespective of where

the injury or death occurs".[2] In sustaining the claim for compensation in this case, the Deputy Commissioner found:

> "the contract of hire by the above employer and the above decedent employee brought the decedent employee to a zone where he had to seek recreation under exacting and unconventional conditions and the decedent was acting in the course of his employment when the accident occurred and that the conditions of the employment created a zone of special danger out of which the fatal injury arose."

The Defense Bases Act provides workmen's compensation benefits for many employed outside the territorial jurisdiction of the states. It was adopted at the request of the Secretary of War in order to save the previous heavy expense of providing its contractors with insurance of such employees on the basis of tort liability and full accident insurance, H. Rep. No. 1070, 77th Cong., 1st Sess. (July 29, 1941),

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[2] 42 U.S.C.A. § 1651

"(a) Except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, shall apply in respect to the injury or death of any employee engaged in any employment—

> (4) under a contract entered into with the United States of any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States), or any subcontract, or subordinate contract with respect to such contract, where such contract is to be performed outside the continental United States and at places not within the areas described in subparagraphs (1)–(3) of this subdivision, for the purpose of engaging in public work. . .

irrespective of the place where the death or injury occurs, and shall include any injury or death occurring to any such employee during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof."

749-225—64——2

pp. 4, 7. See generally, *Republic Aviation Corp.* v. *Lowe*, S.D.N.Y. 1946, 69 F. Supp. 472, affirmed 164 F. 2d 18 (2nd Cir., 1947) cert. den. 333 U.S. 845. Congress intended the act to establish the same finality to decisions of deputy commissioners which is established for the Longshoremen's Act. It must be "liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris* v. *Dikel*, 1953, 346 U.S. 328, 333, — S. Ct. —, — L. Ed. —.

Employees working under the Defense Bases Act, far away from their families and friends, in remote places where there are severely limited recreational and social activities, are in different circumstances from employees working at home. Personal activities of a social or recreational nature must be considered as incident to the overseas employment relationship. The employer recognized the problem: Rose's job was to organize entertainment on and off the base for the off-duty hours of other employees. An employee injured on Grand Turk while off-duty but on call is like a seaman injured ashore on fun of his own. Short of wilful misconduct, the seaman is still in the "service of his ship".[3] Similarly, Rose, off-duty but subject to call, was in the service of his employer.

[3] Cf. "* * * Unlike men employed in service on land, the seaman, when he finishes his day's work, is neither relieved of obligations to his employer nor wholly free to dispose of his leisure as he sees fit. Of necessity, during the voyage he must eat, drink, lodge and divert himself within the confines of the ship. In short, during the period of his tenure the vessel is not merely his place of employment; it is the framework of his existence. For that reason, among others, his employer's responsibility for maintenance and cure extends beyond injuries sustained because of, or while engaged in activities required by his employment. In this respect it is a broader liability than that imposed by modern workmen's compensation statutes. Appropriately it cov-

Whether the Commissioner's determination involves a "question of fact", or a "question of law where Congress intended the administrative agency to have some discretion or leeway in defining and applying the standard," judicial review of administrative determinations of scope of employment is limited by the substantial evidence test.[4] In *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 1951, 340 U.S. 504, 71 S. Ct. 470, 95 L. Ed. 483, the Supreme Court discussed that test as it applies to findings of the Deputy Commissioner in cases under the Defense Bases Act:

"The Deputy Commissioner treated the question whether the particular rescue attempt de-

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ers all injuries and ailments incurred without misconduct on the seaman's part amounting to ground for forfeiture, at least while he is on the ship, 'subject to the call of duty as a seaman, and earning wages as such.'

"* * *

"We think that the principles governing shipboard injuries apply to the facts presented by these cases. To relieve the shipowner of his obligation in the case of injuries incurred on shore leave would cast upon the seaman hazards encountered only by reason of the voyage. The assumption is hardly sound that the normal uses and purposes of shore leave are 'exclusively personal' and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship, without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly." *Aguilar* v. *Standard Oil Co.*, —, 318 U.S. 724, 731, 63 S. Ct. 930, — L. Ed.

[4] See Jaffe, Judicial Review: Question of Law, 69 Harv. L. Rev. 239, 241 (1955); 4 Davis, Administrative Law, §§ 28.06, 29.04, 30.05 (1958); Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1377 (1953). See also Gilmore & Black, The Law of Admiralty, p. 343 § 6-47 (1957); 1 Edelman, Maritime Injury and Death 363 (1960); The Supreme Court, 1950 Term, 65 Harv. L. Rev. 107, 163 (1951).

scribed by the evidence was one of the class covered by the Act [was within the scope of the decedent's employment] as a question of 'fact'. Doing so only serves to illustrate once more the variety of ascertainments covered by the blanket term 'fact'. Here of course it does not connote a simple, external, physical event as to which there is conflicting testimony. *The conclusion contains a combination of the happening and the inferences drawn from them. In part at least, the inferences presuppose applicable standards for assessing the simple, external facts. Yet the standards are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as 'questions of law'.*

"Both sides concede that the scope of judicial review of such findings of fact is governed by the Administrative Procedure Act. Act of June 11, 1946, 60 Stat. 237, Ch. 324, 5 USA §§ 1001 et seq. The standard, therefore, is that discussed in Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, ante, 457, 71 S. Ct. 456. It is sufficiently described by saying that *the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole.*" 340 U.S. at 507–508. [Emphasis added.]

In *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, the injured employee was on Guam, an island far more civilized than Grand Turk. The employee was off-duty, had sought recreation, and was waiting for transportation back to his base from a recreation trip when he dived into dangerous waters, where swimming was prohibited, in order to rescue two employees of another employer. He drowned. The Deputy Commissioner made a finding of "fact", as the Supreme Court "seemingly went out of its way" to

point out,[5] that the death arose out of and in the course of employment. In reinstating the award, set aside by the court below, the Supreme Court held:

> "Workmen's compensation is not confined by common law conceptions of scope of employment, Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 481, 91 L. Ed. 1038, 67 S. Ct. 801; Waters v. William J. Taylor Co., 218 NY 248, 251, 112 NE 727, 728, LRA 1917A 347. The test of recovery is not a causal relation between the nature of the employment of the injured person and the accident. Thom v. Sinclair (Eng) [1919] AC 127, 142 Ann Cas 1917D 188-HL. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. *All that is required is that the 'obligations or conditions' of employment created the 'zone of special danger' out of which the injury arose.*" *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. at 506. [Emphasis added.]

Guam was also the place of employment in *Self* v. *Hanson*. Mrs. Self was injured while in a parked automobile with a friend at a time and place which the Court described as leading to "some cynicism about the parking". In upholding the Deputy Commissioner's award, the court observed:

> "[T]his is a case where the scope of employment should be construed in favor of the workman. . . . Obviously, recreation was considered a necessity for MK-PK employees in Guam. . . . [In] conclud[ing] that Mrs. Self's injury was one 'arising out of and in the course of employment . . . [we] consider our decision consistent with the liberal purpose of the act."

In *Hastorff-Nettles, Inc.* v. *Pillsbury*, 6 Cir. 1953, 203 F. 2d 641, the employee was injured while re-

[5] 4 Davis, Administrative Law 134 (1958).

turning to his base from a Labor Day recreation in Anchorage, Alaska. In upholding the compensation award the court stated:

> "The deputy commissioner undoubtedly had the exclusive and unreviewable right to draw inferences from the unique character and isolated place of the employment in which Vogel was engaged; its remoteness from available recreation and its narrowed limits of normal pastime; the benefit to Vogel and his employer of recreation as an economic factor in industrial relations; the infrequency of an inconvenience to utilize public transportation facilities; * * *. These circumstances and substantial factors, we think, adequately in law justified the Deputy Commissioner in finding as he did on the whole record before him that Vogel's injuries arose out of and in the course of his employment."

In *Pan American* v. *O'Hearne*, 4 Cir. 1964, — F. 2d —, the claimants were the widow and children of Robert M. Smith who was killed in the same automobile accident on San Salvador, (Watling) Island in the British West Indies, in which Frank Gondeck was killed. Smith, Gondeck, and two other friends were returning to the PAA base after spending some leisure hours in "Evelyn's", a native pub in the only settlement on San Salvador. The jeep in which they were riding overturned, because of excessive speed or, perhaps, because of a defect in the road. Smith and Gondeck were killed. The Court, reversing the district court, reinstated the Commissioner's award:

> "The Commissioner concluded that the death of Robert M. Smith arose out of and in the course of his employment. Considering the distant place of employment, the sparsity of population and limited area of the island, the Com-

> missioner determined that the group, including the present decedent, were justified in looking for recreation beyond the confines of their habitat. In the circumstances of his employment-residence, the Commissioner thought, Robert was only 'doing that he [might] reasonably be expected to do.' In short, that his brief exit was 'an incident of the service'. . . . Although some of the factual ascertainments made by the Commissioner may be without full support, we think substantial evidence undergirds his crucial and determinative fact findings. To these he applied correct and apt principles of law. Together they dictate the award."

The *Gondeck* case stands alone, except for a per curiam opinion. In *Gondeck,* the Court noted that the decedent and three others had been sitting around the Reef Club drinking champagne from 4 P.M. to 7:30 P.M., when they took off for town in a jeep which they had been forbidden to use for personal missions. This Court affirmed the district court's order setting aside the Commissioner's award. The Court emphasized, among other things, "nor did [Gondeck] use the means of travel to and from the place of recreation furnished by the employer". In upholding the Commissioner's award to the heirs of Smith, the Fourth Circuit noted:

> "If the evidence adduced [in Gondeck] was of the same factual content as that offered here, we would deferentially disagree with the outcome." *Pan American* v. *O'Hearne,* —— F. 2d at ——.

If *Gondeck* is consistent with *O'Leary* v. *Brown-Pacific-Maxon,* we think that its holding should be limited to the fact-situation presented in the record. There is a major difference between *Gondeck* and the case before us in that the hazard resulting from the left-hand driving rule created a special link between

the injury and the place of employment. The Commissioner was well within the scope of his authority in making the inferences, first, that this British traffic rule exposed Rose to an unusual danger and second, that it was the cause of Rose's death. "If supported by evidence, and not inconsistent with the law, the Deputy Commissioner's inference is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable. . . ." *Cardello* v. *Liberty Mutual Ins. Co.*, 1947, 333 U.S. 469, 477, 67 S. Ct. 801, 91 L. Ed. 1028.

There are other distinctions between the cases. In *Gondeck* the Court noted that the record did not support the Commissioner's finding that the employee was subject to call after his regular duty hours. Here the record shows clearly that Rose was subject to call at all times, without regard to his convenience or to regular working hours. And the record shows that he had been called on a number of times at night to render emergency first-aid. In addition, Rose was not guilty of having violated any company rule at the time of injury; Gondeck's violation cost him his life.

Since for the foregoing reasons *Gondeck* does not control this case, we base our decision on the principle that employment in such places as Grand Turk Island creates a zone of special danger linking the injury with the place of employment. On such an island, lacking in most of the social and recreational facilities usually available to American employees, the individual's recreation is in the service of his employer no less than in his own interest. If an employee subject to call in off-duty hours is injured after his regular day while engaged in recreational or social activities or returning to base, the injury may properly be held to have occurred within the scope of his employment. We hold that the Deputy Commissioner prop-

erly applied these principles to the facts in this case in finding that Rose's death arose out of and in the course of his employment.

We REVERSE and REMAND with instructions that the Deputy Commissioner's order of award be reinstated.